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No. 82-1047

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

ONE ASSORTMENT OF 89 FIREARMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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There is no substance to any of the grounds advanced by respondent in opposition to the petition.

1. In reliance on two civil cases, *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), and *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971), respondent contends (Br. Opp. 11-13) that his prior acquittal on criminal charges bars the government from pursuing a subsequent civil in rem forfeiture proceeding. The argument, however, ignores the fact that this Court has held that the difference between the burdens of proof in criminal and civil actions prevents application of the doctrines of collateral estoppel or res judicata to civil suits brought after a criminal acquittal. *One Lot Emerald Cut Stones & One Ring* v. *United States*, 409 U.S. 232, 235 (1972); *Helvering* v. *Mitchell*, 303 U.S. 391, 397 (1938). See also Pet. 10-13. Respondent's related assertion that the government has already " 'had its day in court' " (Br. Opp.

12 n.4, quoting Pet. App. 21a) is equally unpersuasive because it ignores the factors that militate against giving a criminal acquittal preclusive effect in subsequent litigation. In *Standefer* v. *United States*, 447 U.S. 10, 22 (1980), this Court concluded that a criminal acquittal does not collaterally estop the government because "in a criminal case the Government is often without the kind of 'full and fair opportunity to litigate' that is a prerequisite of estoppel." The Court noted that the government cannot secure a new trial regardless of the fact that "an acquittal was plainly contrary to the weight of the evidence," nor can the government "secure appellate review where a defendant has been acquitted" (447 U.S. at 22). These factors permit juries to acquit "out of compassion or compromise or because of ' "their assumption of a power which they had no right to exercise, but to which they were disposed through lenity" ' " (*ibid.*; citations omitted). As the dissenting judges below noted (Pet. App. 13a), the jury may have acquitted petitioner on the criminal charges because it concluded that he was entrapped into committing an illegal sale even though it may have found that he was engaged in the business of dealing in firearms without a license. Thus, respondent's prior acquittal does not preclude the present forfeiture action.

In reliance on *Boyd* v. *United States*, 116 U.S. 616 (1886), respondent argues that "once a person is tried criminally for a violation of a statute, that same violation cannot, because of the double jeopardy clause * * *, form the basis for a subsequent forfeiture action" (Br. Opp. 13-14). In *United States* v. *Ward*, 448 U.S. 242, 253 (1980), however, the Court rejected a similar contention, noting that it "has declined * * * to give full scope to the reasoning and dicta in *Boyd*." Significantly, neither respondent nor the court below advert to the two-level inquiry mandated by *Ward*, which, as demonstrated in our petition (Pet. 13-18), establishes that the present forfeiture proceeding is a civil

penalty. Because the present forfeiture proceeding is civil rather than criminal in nature, respondent's invocation of the Double Jeopardy Clause of the Fifth Amendment is unavailing.

In a final attempt to raise the shield of collateral estoppel, respondent asserts (Br. Opp. 10-11) that the "jury acquittal constitutes a direct holding that there was no violation of the criminal laws," thus precluding a forfeiture action based upon the violation of federal gun control law. 18 U.S.C. 924(d). This contention can be quickly put to rest. An acquittal, of course, establishes only that the government has not shown beyond a reasonable doubt that certain facts exist; it does not conclusively or even probably establish that those facts do not exist. Thus, petitioner's prior acquittal could bar a civil forfeiture action under 18 U.S.C. 924(d) only if it prevented the government from showing that, notwithstanding the acquittal, a violation of the gun control laws actually occurred. As shown above, a criminal acquittal raises no such estoppel. *Standefer* v. *United States, supra*, 447 U.S. at 22; *One Lot Emerald Cut Stones* v. *United States, supra*, 409 U.S. at 235.

2. Respondent claims (Br. Opp. 14) that the "conflicts in decisions asserted by the Government are illusory." In so asserting, respondent completely ignores the fact that the lower court's ruling does not comport with this Court's decision in *United States* v. *Ward, supra*, nor with the teachings of *Helvering* v. *Mitchell, supra*, and *One Lot Emerald Cut Stones* v. *United States, supra*. Pet. 13-17. Respondent cannot render a conflict "illusory" by the simple expedient of disregarding the prior decisions of this Court. Similarly, rather than discussing the conflicting circuit court opinions noted in our petition (Pet. 17), respondent simply rests (Br. Opp. 14) on the opinion of the court below--even though that opinion discusses only two of the

conflicting cases cited in our petition. See Pet. App. 8a-9a. Respondent has failed to show, let alone "abundantly demonstrate[ ]" (Br. Opp. 9), that "there is no conflict with any decision of this Court or any other court of appeals" (*ibid.*).

3. Respondent contends (Br. Opp. 8) that the decision of the en banc court below does not raise any issue of importance. As we pointed out in our petition (Pet. 18 n.8), however, the decision will create grave confusion as to whether civil or criminal procedures should be followed in forfeiture actions under 18 U.S.C. 924(d). The possible implications of the decision, therefore, are not insubstantial. See Pet. 18-19 n.8 (the decision below might "require application of the Federal Rules of Criminal Procedure to all forfeiture proceedings based on a violation of federal criminal law").

Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be granted and the judgment of the court of appeals reversed.

REX E. LEE
Solicitor General

FEBRUARY 1983

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